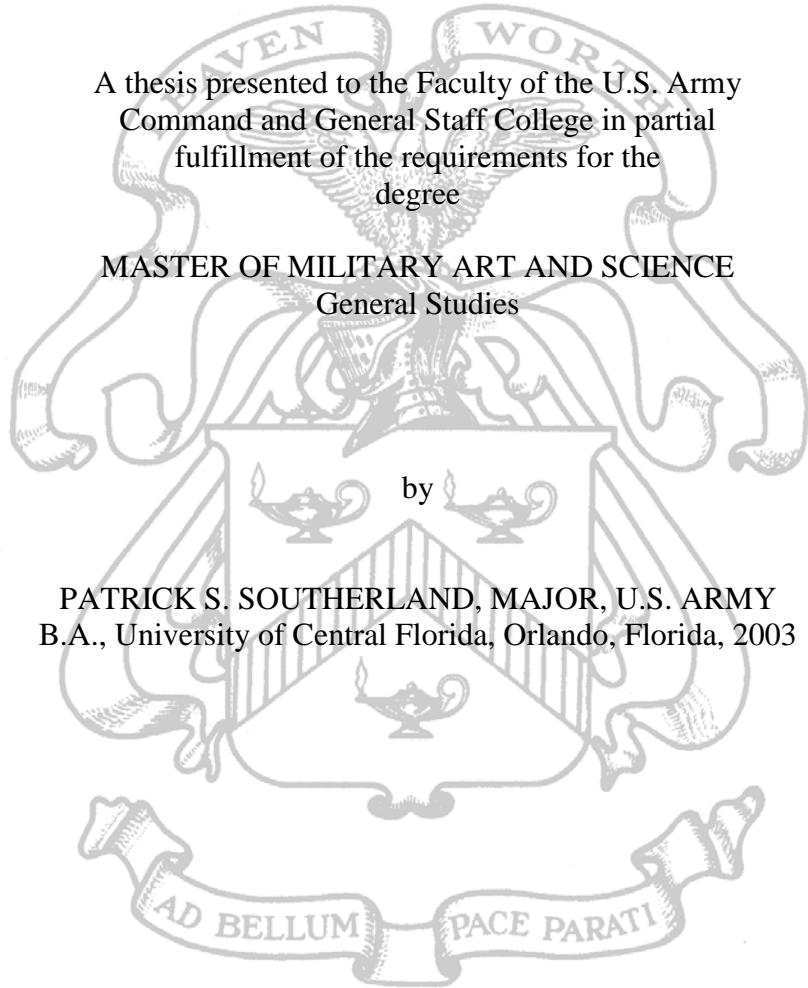


ETHICS IN SERVICE TO THE AMERICAN PEOPLE

A thesis presented to the Faculty of the U.S. Army
Command and General Staff College in partial
fulfillment of the requirements for the
degree

MASTER OF MILITARY ART AND SCIENCE
General Studies



PATRICK S. SOUTHERLAND, MAJOR, U.S. ARMY
B.A., University of Central Florida, Orlando, Florida, 2003

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THESIS APPROVAL PAGE

Name of Candidate: Major Patrick S. Southerland

Thesis Title: Ethics in Service to the American People

Approved by:

_____, Thesis Committee Chair
MG William D.R. Waff, D.Min.

_____, Member
Robert A. Why, M.A.

_____, Member
MAJ Michael C. Friess, LL.M.

Accepted this 13th day of June 2014 by:

_____, Director, Graduate Degree Programs
Robert F. Baumann, Ph.D.

The opinions and conclusions expressed herein are those of the student author and do not necessarily represent the views of the U.S. Army Command and General Staff College or any other governmental agency. (References to this study should include the foregoing statement.)

ABSTRACT

ETHICS IN SERVICE TO THE AMERICAN PEOPLE, by Major Patrick S. Southerland, U.S. Army, 74 pages.

The level of confidence the American people have in the Senate continues to be dismal at best. In contrast, the American people continue to have a high level of confidence in our military. This research will determine if the Senate should be held accountable to the same ethical standards as U.S. military officers in order to regain trust and confidence from the American people. Both the Senate and officers have similar codes of conduct. The disparity is found when analyzing the exceptions and exemptions the Senate affords themselves. The other issue is how there are differences on how violators of the codes are held accountable.

A brief history of the evolution of ethics for the Senate and military officers is presented to create an understanding of the current ethical codes for these two institutions. A brief comparison is made between the Senate and military officer codes of ethics to determine the similarities and differences. The illustration is expanded by examining the rules of both institutions regarding gifts. Jurisdiction and accountability is discussed while providing a five-year analysis of ethical violations of the Senate and Army officers during the 2009-2013 period. The final chapter provides conclusions and recommendations to assist the Senate in changing the perception of the American people. It is clear that the current systems are falling short of garnering the confidence that is needed for our nation.

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ACRONYMS

CAPE	Center for the Army Profession and Ethic
DoD	Department of Defense
JER	Joint Ethics Regulation
MCM	Manual for Courts-Martial
S.Res.	Senate Resolution
UCMJ	Uniform Code of Military Justice
U.S.C.	United States Code

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CHAPTER 1

INTRODUCTION

But the truth is in the results, and that's zero accountability . . . We will continue to fight for justice and accountability. That is our duty.

—Senator Kirsten Gillibrand, “Statement on Senate Vote to Reform Military Justice System”

The remarks above were made on March 6, 2014 following the vote on the bipartisan Military Justice Improvement Act which fell five votes shy of breaking a filibuster. The Military Justice Improvement Act moves the decision whether to prosecute any crime punishable by one year or more in confinement to independent, trained, professional military prosecutors, with the exception of crimes that are uniquely military in nature, such as disobeying orders or going Absent Without Leave. The decision whether to prosecute 37 serious crimes uniquely military in nature, plus all crimes punishable by less than one year of confinement, would remain within the chain of command.¹ On June 14, 2013, Gallup Editor-in-Chief Frank Newport revealed that out of 16 institutions measured, Americans are most confident in the military, at 76 percent, and least confident in Congress, at 10 percent.² Is the United States Senate in a better ethical or moral position to judge justice and accountability of the military? The purpose of the research behind this paper is to determine whether or not the Senate should be held accountable for the same rules of conduct as officers serving in the Department of Defense (DoD). The term Officers will apply to all seven uniformed services for the purpose of this paper, while specific examples will commonly come from the United States Army.

The professions of serving the nation in the Senate or as an officer both rely on trust. Trust between the citizens of the United States and those who serve in these professions. If officers or members of the Senate lose this trust, the United States could suffer great political or military instability. This instability could have a significant impact on our nation's ability to project national power. The personal behavior and daily conduct in the exercise of official duties by the Senate and officers are publicized daily throughout the world. The examples portrayed by these leaders greatly influence how the American people and the international community view our nation. As leaders, we are judged daily on our adherence to our codes of conduct. Therefore, the need for us to set and maintain ethical standards is paramount to maintain the duties our nation expects us to carry out. If these standards are violated, then the senators and officers should be held accountable.

Because both professions rely on the trust of the American people, and because they both set an example for the American people, both professions should have a standardized and consistent code of ethical conduct and personal behavior, and the consequences of violations of these standards should be consistent as well. By creating this standardization and holding the senators and officers to the same ethical standard, the relationship between the senators, officers, and the American people will be strengthened.

There are four primary sources to determine officer ethical standards. These sources are: Department of Defense (DoD) Directive 5500.07, *Standards of Conduct* (November 29, 2007); DoD Directive 5500.07-R, *The Joint Ethics Regulation* (JER), including Changes 1-7. (November 17, 2011); 5 Code of Federal Regulations 2635, *Standards of Conduct of the Executive Branch*; and 5 Code of Federal Regulations Part

3601, *Supplemental Standards of Conduct for Employees of the Department of Defense*.

By contrast, the Senate is held to the standards found in the *Senate Ethics Manual* passed by the 108th Congress in 2003. Though both organizations have similar codes of conduct, the American people have more confidence in the military. Arguably, the reasons for this may have nothing to do with codes of conduct. The military may have higher confidence due to the daily sacrifices military members and their families endure daily in their service to the American people. The American people respect and trust the military because they are willing to put their lives in danger, be separated from their families throughout several combat deployments and many other sacrifices to the nation through selfless service to the people. This thesis examines why results such as the aforementioned Gallup Poll have remained consistent for several years and offers recommendations on how the Senate could regain trust by the American people.

As an active duty Army officer, the author recognizes and appreciates the subservient relationship the military has to the Senate. Officers undoubtedly look for the leaders in the Senate to be good examples of ethical behavior and be held accountable to violations of their ethical code. Of course, senior officers set the tone and climate of the inculcation of professional ethics; but at the end of the day, military officers know their conduct is judged by law enacted by the Senate. If senators do not hold themselves accountable to the same standards they expect from officers, it provides a poor example of expected conduct. If this inequity remains unbalanced, it can create discord and promulgate inequity and pretension. In other words, even if our code of ethics are identical, there must be equality in how violators of our codes are held accountable.

This thesis examines the history of ethical codes of conduct for both the Senate and military officers in order to demonstrate how the codes have evolved into the current standards. This study will then compare both codes of conduct to find similarities and differences. Research analyzing current trends of conduct during the 2009-2013 period will also be given to determine if there are significant differences between these two bodies, and provide recommendations for change where appropriate. Providing analysis of the reported violations in this thesis provides a closer look at the type and frequency of these violations and the consequences of such conduct. Recommendations will be as objective as possible to avoid the personalities behind the raw data.

There are specific assumptions and facts that must be understood to realize the perspective of the author. This thesis is not a philosophical study. This study will determine the facts related to these two institutions, identify negative or positive perceptions regarding these institutions, and provide recommendations on how the Senate may improve their standing with the American people. There is an assumption that not all facts will be available through public sources. However, where conclusions have been made, there has been thorough and detailed analysis of the data available.

One inherent limitation to this research is bias. The desire is a standardization of ethical conduct and accountability for senators and military officers. Even though this bias exists, the facts illustrated throughout this study stand on their own, drawing either the same conclusions or a variation based on other research studies.

Trust in our nation's military leaders and Senate is the cornerstone of our nation's ability to project the will of the people in both domestic and international issues during the twenty-first century. United States citizens have numerous expectations of senators

and officers regarding how they represent themselves and the nation during the conduct of official duties. Based on research discussed throughout this study, the American people have more confidence in the military than in the Senate.

There is a trust and loyalty between leaders and subordinates throughout the Army. The ability to empower through mission command would simply fail without this trust. This trust would be critically damaged without a standard of conduct expected of an officer. The desire is that this high esteem exist for the Senate in the future. Every time a leader violates the code of ethics and is not held accountable, the United States citizens question their confidence in respectability, be it with the Senate or the officer corps.

In conclusion, this thesis will provide specific analysis to prove or disprove the need for the standardization of ethical standards and enforcement of those standards between the Senate and military officers. The literature for this research is vast, but considerable efforts were made to present only factual information for comparisons in research. The use of commentary in this research will be provided to demonstrate public opinion regarding issues related to this study.

¹Kirsten Gillibrand, “Comprehensive Resource Center for the Military Justice Improvement Act,” U.S. Senate, <http://www.gillibrand.senate.gov/mjia> (accessed May 6, 2014).

²Frank Newport, “Americans Have Most Confidence in Military, Least in Congress,” Gallup Inc., 14 June 2013, <http://www.gallup.com/video/163076/americans-confidence-military-least-congress.aspx> (accessed April 19, 2014).

CHAPTER 2

LITERATURE REVIEW

There has been remarkably little written on the idea of the Senate and the military officers corps being held to the same ethical standard. There is an undeniable relationship between the Senate and the officers corps, yet their respective exceptions to the standards of conduct and how violators are held accountable in each institution do not coincide. This may be one reason why numerous polls over time exhibit a high level of confidence and trust in officers and a low level of confidence and trust in the Senate. The only way to determine if this is a correct statement is to compare and contrast the Senate's code of ethics and the military's JER.

Most unethical conduct in the military is addressed in accordance with law passed by the Senate, but senators are held accountable only to self-imposed policy without much incentive for impartial judgment. This major difference demonstrates the disparity between each institution is held accountable to ethics. For example, when a law is violated there are punitive consequences which are imposed to the violator. However, if you violate a policy there may or not be penalties. If there are penalties then the Select Committee on Ethics can send recommendations or can transfer the alleged violation to other governmental institutions such as the Department of Justice. The committee lacks authority and standardized punishments to self regulate.

An attempt was made to acquire statistical analysis of ethical behavior from the Center for the Army Profession and Ethic (CAPE). However, this information was not readily available. The mission and intent of CAPE is defined as:

CAPE, on behalf of CG, CAC, serves as the proponent for the Army Profession, the Army Ethic and Character Development of Army Professionals to reinforce Trust within the profession and with the American people. The intent with the purpose to reinforce Trust within the profession and with the American people: the foundation for successful accomplishment of the Army Mission, consistent with the Army Ethic. Outlining the following key tasks:

- Support Army wide efforts (Army Campaign Plan, TRADOC Strategic Plan, Ready and Resilient Campaign Plan and Human Dimension TF)
- Create and integrate Army Profession, Army Ethic and Character Development doctrine and concepts into training, leadership development, Professional Military Education, and the Civilian Education System
- Promulgate the Army Ethic
- Develop the Army Character Development concept, strategy, and doctrine
- Assess effectiveness of Army Profession efforts¹

Their end state is: “An Army culture that reinforces Trust within the Army Profession and with the American people.”² This organization is an attempt to ensure proper leadership training and standards are adhered to throughout the Army. The author was unable to obtain Army officer code of conduct violation statistical analysis for this research which begs the question: should CAPE be keeping these types of records for the Army to identify trends or successes? Therefore, for the purposes of this research, trends in violations of ethical behavior for Army officers was determined by court-martial proceedings. Most research obtained for the Senate, including violations, was found on the Senate website which is open to the public. Although this seems transparent, it may not be sufficient to fully supply comparable information.

During the research, there were several articles and books concerning the history of the officer ethic. The award-winning MMAS thesis of 2013 from the Command and General Staff College argued against historians that the idea of professional

characteristics, such as trust, existed even prior to 1812.³ It was apparent, however, that military leadership is quite serious about articulating the need for the military to be trusted by the American people. This was evidenced through several senior officer publications and speeches. Due to the military history of the post-Vietnam era, when the confidence of the American people in the military was very low, military leaders were working diligently to keep this from happening again during the next post-war era. For example, the FY14 “America’s Army—Our Profession Stands Strong” program serves as an example of operationalizing the need for sustained trust. This is one of several programs CAPE provided to leaders to assist in ethics training. After analyzing polls, several conclusions were drawn which support the fact that the American people trust the military much more than members of Congress. The research polls included the Senate and the House of Representatives.

The research related to the final recommendations and conclusions offers ways in which the Senate could enforce their code of ethics in a manner that would be more acceptable and transparent to the American people. Taking considerable time to research the related information, there are ways the Senate could be publicly held accountable through transparency and a better mechanism for self regulation for both personal behavior and professional conduct. Of course, there will be exceptions, but how these exceptions are allowed is equally important. The next chapter will explain the methodology followed to determine the need for ethical standardization.

¹Center for the Army Profession and Ethic, “Mission,” <http://cape.army.mil/mission.php>, U.S. Army (accessed April 10, 2014).

²Ibid.

³Christopher W. Wingate, “Military Professionalism and the Early American Officer Corps, 1789-1796” (Master’s Thesis, U.S. Army Command and General Staff College, Ft. Leavenworth, KS, June 2013), 2-3.

CHAPTER 3

METHODOLOGY

In his farewell address, President George Washington stated that ‘The Constitution . . . is sacredly obligatory upon all. The very idea of the power and right of the people to establish government presupposes the duty of every individual to obey the established government.’ This is even truer for us as members of the Profession of Arms. When we take our oath of service, we do not swear allegiance to the commander in chief or the Army chief of staff but rather to our Constitution. And it is in the Constitution that we find the military in a relationship subordinate to our civil authorities who, incidentally, are elected by the American people. So ultimately, it is the American people who are our clients and to whom we are subservient. To truly be professionals and discharge our duty to serve the American people, we must develop a relationship of trust with them.

—LTG Robert L. Caslen, Jr. and
CPT Nathan K. Finney, *Military Review*

Because the American people determine the course of this country, it is imperative that both the Senate and military officers never lose the trust of the people in which we serve. Because military officers are subservient to the Senate then the American people’s trust of the Senate will always remain important to military officers. For several years, there has been a great deal of disparity between the confidence the American people have for the Senate and military officers. One reason for this may be when the American people can observe the perception of actual misinformation, or factually wrong information stated by a senator. If there is no penalty for such an act and no mechanisms in place to hold the Senate accountable for a violation of the code of ethics, then the erosion of the American people’s trust for the Senate will continue to corrode.

There is a need for a shared code of conduct and accountability to this conduct between officers and the Senate. There is also a professional underpinning that leaders

need strong character. Therefore, this study utilized several documented resources to illustrate various points and conclusions. This study analyzed the history of ethical standards for the Senate and military officers to determine the background of the current standards. Following the historical analysis, the current codes of ethics were provided to determine differences and similarities in standards and accountability for violations. In an attempt to narrow this part of the research, comparison is made between the entire Senate Code of Ethics and the JER, and more specifically the gifts rules and the exclusions and exceptions for both the Senate and military officers. At first glance, while the standards are very similar, very different outcomes were discovered when analyzing both the exceptions to the codes as well as the enforcement mechanisms and accountability of those who violate these codes. Outliers such as penalties associated with adultery and conduct unbecoming an officer are also discussed and lead to a meta-study conducted to gather public information regarding ethical violations by the Senate and officers between the years 2009 and 2013. The purpose of this research was to identify trends, similarities, and differences in the violations and the consequences of the violations. The next two chapters will provide a historical analysis of the code of conduct for the Senate and the DoD.

CHAPTER 4

HISTORY OF THE UNITED STATES MILITARY STANDARDS OF CONDUCT

The primary research question is: Should the United States Senate be held accountable to the same code of conduct as military officers? This chapter relates to the research question by analyzing the history of how ethics have been established for officers and how the military is charged, through law, to hold violators accountable. This is very different than the Senate which is held accountable by policy. The previous chapter discussed the methodology used to conduct this research. This chapter will discuss the history of the ethical standards for officers in order to present a historical framework to better understand the evolution of standards for an officer. This chapter will also examine the enforcement of violations of misconduct.

As previously stated, an argument could be asserted that military officers have had professional ethics inculcated as a core principle since before 1812. Major Christopher Wingate's, previously cited, award-winning MMAS thesis of 2013, "Military Professionalism and the Early American Officer Corps, 1789-1796," provides a thorough analysis of this point. The officer has had a code of ethics since the creation of the Corps. Once established, service in the Army became a profession with ethical rules and standards. In February 2010, then-Colonel Matthew Moten, wrote, "The Officers' Professional Ethic-Past, Present, and Future," accepting the challenge by then-General George W. Casey, Jr., Chief of Staff, United States Army, encouraging the Army, as a profession, to "think critically about our Professional Military Education and promote dialogue at all levels as we deepen our understanding of what this time-honored source of strength means to the profession today."¹

As written by Colonel Moten:

Following the American Revolution, American military service changed in several ways. First, and mainly a legacy of General George Washington's example, was strict adherence to a principle of civilian control of the military. Second, despite long-standing fears, the new nation found it necessary in an emergency to raise a regular army—local militias were not sufficient to the task, although they proved to be a welcome complement to the Continentals. Still, professionalism was not yet a component of commissioned leadership. After the Revolution, American leaders found the Articles of Confederation inadequate to govern the new republic, mainly in providing for the common defense. The Constitution remedied that shortcoming, clearly codifying principles for raising military forces, providing for their leadership, and establishing war powers. Just as clearly, the Constitution divided² control of the military between the Executive and the Legislative Branches, creating dual loyalties that govern, and can complicate, American civil-military relations to this day. Yet the Constitution's most profound legacy was to foster a national reverence for the rule of law. The requirement that each Federal officer swear an oath to support and defend the Constitution of the United States enshrined that principle in the professional military ethic.³

On June 30, 1775, the Second Continental Congress established 69 Articles of War to govern the conduct of the Continental Army. Effective upon its ratification in 1789, Article I, Section 8 of the United States Constitution provided that Congress has the power to regulate the land and naval forces.⁴ On April 10, 1806, the United States Congress enacted 101 Articles of War, which were not significantly revised until over a century later. Discipline in the sea services was provided under the Articles for the Government of the Navy (commonly referred to as "Rocks and Shoals"). The Articles of War evolved during the first half of the twentieth century. They were amended in 1916 and 1920, and culminated with the substantial reforms in the 1948 version pursuant to the Selective Service Act of 1948 (also known as the Elston Act) (Public Law 80-759, 62 Statute 604). By comparison, its naval counterpart remained little changed. The military justice system continued to operate under the Articles of War and Articles for the Government of the Navy until May 31, 1951, when the Uniform Code of Military Justice

(UCMJ) went into effect.⁵ Before analyzing the military's criminal code to illustrate how military officers are held accountable to violations of our code of ethics we must examine the JER further.

This JER provides a single source of standards of ethical conduct and ethics guidance, including direction in the areas of financial and employment disclosure systems, post-employment rules, enforcement, and training.⁶ DoD personnel shall perform their official duties lawfully and comply with the highest ethical standards.⁷ Violation of any provision in DoD civilian employees may result in appropriate criminal prosecution, civil judicial action, disciplinary or adverse administrative action, or other administrative action authorized by United States Code (U.S.C.) or federal regulations.⁸

As previously stated, military officers have several mechanisms in place to promote good order and discipline. One extremely effective way to ensure adherence to the code of ethics is criminal prosecution available to military officers generally in command positions. This authority simply does not exist within the powers of the Senate's Select Committee on Ethics. Due to this lack of authority, the committee must refer to other intergovernmental departments. The criminal code enforced by the Senate to military officers will now be addressed.

The UCMJ was passed by Congress on May 5, 1950, and signed into law by President Harry S. Truman the next day. It took effect on May 31, 1951. The word "uniform" in the code's title refers to its consistent application to all the armed services in place of the earlier Articles of War, Articles of Government, and Disciplinary Laws of the individual services.⁹

The UCMJ, the Rules of Court Martial (the military analogue to the Federal Rules of Criminal Procedure), and the Military Rules of Evidence (the analogue to the Federal Rules of Evidence) have evolved since their implementation, often paralleling the development of the federal civilian criminal justice system. In some ways, the UCMJ has been ahead of changes in the civilian criminal justice system. For example, a rights-warning statement similar to the Miranda warnings (and required in more contexts than in the civilian world where it is applicable only to custodial interrogation) was required by Article 31 (10 U.S.C. § 831) 15 years before the Supreme Court ruled in *Miranda v. Arizona*; Article 38(b) (10 U.S.C. § 838(b)), continued the 1948 Articles of War's guarantee that qualified defense counsel be provided to all accused without regard to indigence (and at earlier stages than required in civilian jurisdictions), whereas the Supreme Court only guaranteed the provision of counsel to indigents in *Gideon v. Wainwright*, 1963. Additionally, the role of what was originally a court-martial's non-voting law member developed into the present office of military judge whose capacity is little different from that of an Article III judge in a United States district court. At the same time, the court-martial itself (the panel of officers hearing the case and weighing the evidence) has converted from being essentially a board of inquiry/review presiding over the trial, into a jury of military service-members. The current version of the UCMJ is printed in the latest edition of the 2012 *Manual for Courts-Martial* (MCM), incorporating changes made by the President (executive orders) and National Defense Authorization Acts of 2006 and 2007.¹⁰

Officers swear an oath throughout their career, and currently it is customary to reassert that same oath at each promotion to serve as a reminder of the officer's commitments to the Constitution and the nation. This reassertion of the oath is not required. However, this oath also reminds officers that we are expected to adhere to a code of conduct in order to remain trusted with more responsibility and authority. The history of this code will now be analyzed.

In summary, this chapter provided a brief historical background of military standards of conduct. It is clear that the United States military is mandated to follow a code of conduct and violators can be punished under the provisions of the UCMJ. This was imposed on the military by the United States Constitution and through corresponding legislation. This will be expanded in the next chapter.

¹Don Snider, Paul Oh, and Kevin Toner, “The Army’s Professional Military Ethic in an Era of Persistent Conflict” (Monograph, Strategic Studies Institute, U.S. Army War College, Carlisle, PA, October 2009), <http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB895.pdf> (accessed April 21, 2014), iii.

²Richard Swain, “Reflection on an Ethic of Officership,” *Parameters* 37, no. 1 (Spring 2007): 4-22.

³Colonel Matthew Moten, “The Officers’ Professional Ethic-Past, Present, and Future,” Strategic Studies Institute, and U.S. Army War College Press, February 2010, <http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB966.pdf> (accessed May 1, 2014), 3-4.

⁴Legal Information Institute, U.S. Constitution, Cornell University Law School, <http://www.law.cornell.edu/constitution/article> (accessed April 21, 2014), art. I, sec. 8.

⁵Ibid.

⁶Secretary of Defense, Department of Defense 5500.107-R, *Joint Ethics Regulation* (Washington, DC: U.S. Government Printing Office, August 1993), 1.

⁷Department of Defense, Department of Defense Directive 5500.07, *Standards of Conduct* (Washington, DC: U.S. Government Printing Office, November 29, 2007), 4.3.

⁸Ibid., 2.2.6.2.

⁹“Truman Signs Code of Service Justice,” *New York Times*, May 7, 1950, <http://www.nytimes.com/subscriptions/Multiproduct/lp87JHJ.html> (accessed March 31, 2014).

¹⁰Wikipedia, “Uniform Code of Military Justice,” http://en.wikipedia.org/wiki/Uniform_Code_of_Military_Justice#cite_ref-1 (accessed 13 April 2014).

CHAPTER 5

HISTORY OF THE SENATE STANDARDS OF CONDUCT

The primary research question is: Should the Senate be held accountable to the same code of conduct as military officers? This chapter relates to the research question by analyzing the history of how standards of conduct have been established for the Senate and how the Senate's Select Committee on Ethics is empowered (or not empowered) to hold violators accountable. The previous chapter discussed the history of the military standards of conduct and illustrated how the JER and UCMJ are instruments available to enforce those standards. This chapter will discuss the history of the Senate standards of conduct in order to present an historical framework and comparison to the previous chapter.

There are several documents describing the history and jurisdiction of ethics in the Senate that have been analyzed to provide a brief summary of how the Senate progressed to their current standards of conduct. The way in which the Senate holds itself accountable is not as stringent as the officer corps. The people who elect them into office expect the Senate to adhere to a code of ethics and be held accountable for violations. The information utilized for this portion of the research was gathered from the Senate homepage and the Congressional Research Service. This synopsis utilizes readily-available information through public domains. The information provided is current as of November 2013. One of these reports revised an earlier report by Ms. Mildred Amer, who was a specialist in the American National Government at the Congressional Research Service. In fact, Ms. Amer's analysis is frequently quoted on the United States Senate's Select Committee on Ethics History homepage. The most current analysis by the

Congressional Research Service was written by Mr. Jacob R. Straus. His research and analysis serves as the objective template for this portion of the study. Analysis will be provided throughout this study regarding the expected ethic and accountability of violations of the Senate to provide a baseline for the overall research of this study.

The United States Constitution provides sole authority to establish rules, punish, and expel Members to the House of Representatives and the Senate, respectively. Article I, Section 5, clause 2 provides that, “Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.”¹ This important fact will be addressed later in the research. The fact that the Senate is charged with the responsibility of holding themselves accountable for violations of their own ethical code may not be transparent enough for the American people.

In the eighteenth and nineteenth centuries, the Senate used its authority to establish ethics rules and to punish individual members sparingly.² Former Senate historian, Mr. Richard Baker, observed, “[f]or nearly two centuries, a simple and informal code of behavior existed. Prevailing norms of general decency served as the chief determinants of proper legislative conduct.”³ During that time, Congress often dealt with ethics issues, “on a case-by-case basis, [and then] only with the most obvious acts of wrongdoing, those clearly ‘inconsistent with the trust and duty of a member’.”⁴ These previous standards seem more like a reaction to public outcry vice a standard with instruments that enable the Senate to enforce their own rules. There is little evidence to suggest that the members of the Senate themselves took accountability for violations seriously. Due to such public outcries, members of the Senate would be compelled to hold

a member accountable. This act would demonstrate their distain for the member being accused of such an impropriety to often save face with their own constituents. Has this changed? This chapter examines the history and evolution of the Senate Select Committee on Ethics, including the committee’s jurisdiction and investigative procedure. It does not deal with changes to criminal law—as defined in Title 18, U.S.C.—with criminal prosecutions of Members of Congress, or with the specifics of disciplinary cases in the Senate.⁵ However, an aggregate study of such violations will be analyzed in the next chapter.

Events in the early 1960s, including charges of corruption and influence peddling against the Secretary to the Majority Leader, Mr. Robert G. “Bobby” Baker, prompted the Senate Committee on Rules and Administration, which had jurisdiction over “[m]atters relating to the payment of money out of the contingent fund of the Senate or creating a charge upon the same,”⁶ to hold hearings on financial and business activities of current and former Members, officers, and employees of the Senate.⁷ Prior to the 88th Congress (1963-1964), no standard mechanism existed for discipline of the Senate. During the 88th Congress, the Senate created the first ethics committee: the Select Committee on Standards and Conduct.⁸ This was the first standard of conduct mechanism in the two-century history of the United States Senate. Ethics reform became more salient in the Senate after Mr. Baker resigned on October 8, 1963, following allegations that he had misused his official position for personal financial gain.⁹

Following Mr. Baker’s resignation, the Senate adopted Senate Resolution (S.Res.) 212 to “inquire into the financial and business interests of any officer, employee, or former employee of the Senate.”¹⁰ This resolution directed that the Committee on Rules

and Administration conduct an investigation into the financial and business interests of current and former officers and employees. The resolution stated:

Resolved, That the Committee on Rules and Administration or any duly authorized subcommittee thereof is authorized and directed to make a study and investigation with respect to any financial or business interests or activities of any officer or employee or former officer or employee of the Senate, for the purpose of ascertaining (1) whether any such interests or activities have involved conflicts of interest or other impropriety, and (2) whether additional laws, rules, or regulations are necessary or desirable for the purpose of prohibiting or restricting any such interests or activities. The Committee shall report to the Senate at the earliest practicable date the results of its study and investigation, together with such recommendation as it may deem desirable.¹¹

Pursuant to S.Res. 212, the Committee on Rules and Administration held a series of hearings to investigate the general business interests and activities of Senate officials and employees.¹² In the report issued following the hearings, the committee recognized that serious allegations had been made against a former employee, and that no specific rules or regulations governed the duties and activities of members, officers, or employees of the Senate. The committee also concluded that many of Mr. Baker's outside activities were in conflict with his official duties and made several recommendations, including adoption of public financial disclosure rules and other guidelines for Senate employees.¹³

“Following the investigation into Mr. Baker, additions to the Senate rules—calling for public financial disclosure reports and more controls on staff involvement with Senate campaign funds . . . were introduced to implement the committee’s recommendations.”¹⁴ Additionally, the Committee on Rules and Administration considered the creation of a separate ethics committee. In a committee report on proposed amendments to Senate rules, Senator John Sherman Cooper of Kentucky unsuccessfully proposed an amendment to create a select committee on standards and conduct. Senator Cooper’s response to the failure of the amendment was:

I regret that a resolution which I offered was rejected by the majority party representation on the committee. The resolution which I offered would have established a select committee on standards and conduct, composed of six members, three from each of the parties, to be appointed by the President of the Senate. This committee would be authorized to receive complaints of unethical, improper, illegal conduct of members, officers, or employees of the Senate, to make investigation of allegations of such conduct, to propose rules and regulations, to give advisory opinions, and to make recommendations to the Senate regarding disciplinary action if required.

I believe the establishment of such a committee made up of distinguished Members of the Senate would act as a deterrent upon possible violations, and in the exercise of jurisdiction, would have the confidence of the Senate and the public. I do not consider that such a special select committee should be considered as a policing committee, but one which, as I have said, would deter possible violations and deal with them with utmost dispatch and fairness.¹⁵

On July 1, 1964, Senator B. Everett Jordan of North Carolina proposed a resolution (S.Res. 338) to amend the jurisdiction of the Committee on Rules and Administration and allow the committee to investigate every alleged violation of the rules of the Senate, and to make appropriate findings of fact and conclusions with respect thereto after according to any individual concerned due notice and opportunity for hearing. “In any case in which the committee determines that any such violation has occurred, it shall be the duty of the committee to recommend to the Senate appropriate disciplinary action, including reprimand, censure, suspension from office or employment, or expulsion from office or employment.”¹⁶

Although the Select Committee on Standards and Conduct undertook several investigations from 1969 to 1977, it was sometimes characterized as “antiquated,” “do-little,” or as a “watchdog without teeth.”¹⁷ Moreover, the Senate ethics code, which the committee wrote in 1968, was often viewed as ineffective.¹⁸ In 1976, a select committee created to study the Senate committee system recommended that the functions of the Select Committee on Standards and Conduct should be placed under the Senate Rules

and Administration Committee.¹⁹ However, the Rules Committee rejected the idea and instead recommended establishment of a newly-constituted bipartisan ethics committee to demonstrate to the public the “seriousness with which the Senate views congressional conduct.”²⁰ In response, the permanent Select Committee on Ethics was created in 1977 to replace the Select Committee on Standards and Conduct.²¹

The jurisdiction of the United States Senate Select Committee on Ethics is derived from the Constitution and authority granted under law and Senate rules. The Senate Select Committee on Ethics is authorized to receive and investigate allegations of improper conduct which may reflect upon the Senate, violations of law, violations of the Senate Code of Official Conduct and violations of rules and regulations of the Senate; recommend disciplinary action; recommend additional Senate rules or regulations to insure proper standards of conduct; and report violations of law to the proper federal and state authorities.²² The committee is later described as the supervising ethics office. In reality, even though the Senate should self-regulate, they simply cannot based on the current regulation. If the committee is charged to hold its members in accordance with a code of ethics then they should be given the authority to discipline violations without seeking other governmental agencies.

In summary, this chapter provided a brief historical background of the Senate’s standards of conduct, the establishment of a Select Committee on Ethics, and the ways the Select Committee on Ethics holds the Senate accountable. As previously stated, the military officer corps has been mandated to follow a code of conduct. The major difference here is not that the Senate and officers have disparate differences in their code of conduct, but rather the way violators are held accountable. Military officers have

instruments such as the UCMJ, non-judicial punishment, and adverse administrative action to enforce their ethical standards. The Select Committee on Ethics does not have these same instruments to hold themselves accountable. The next chapter will provide a comparison of the current code of conduct for the Senate and officers to determine similarities and differences.

¹U.S. Congress, House, “Article I, Section 5, clause 2,” The Constitution of the United States, 108th Cong., 1st sess., H.Doc. 108-96, 2003, quoted in Jacob R. Strauss, CRS Report RS30764, *Enforcement of Congressional Rules of Conduct: A Historical Overview*, (Washington, DC: Congressional Research Service, November 12, 2013), http://www.senate.gov/CRSReports/crs-publish.cfm?pid='0E%2C*PLG%3D%23P++%0A (accessed April 21, 2014), 4.

²Richard Allan Baker, *The Senate of the United States: A Bicentennial History* (Malabar, FL: Robert K. Krieger Publishing Company, 1988), 109. For more information on Senate censure and expulsion cases, see U.S. Congress, Senate, Committee on Agriculture, Nutrition, and Forestry, United States Senate Election, Expulsion and Censure Cases: 1793-1990, prepared by Anne M. Butler and Wendy Wolff, U.S. Senate Historical Office, 103rd Cong., 1st sess., S.Doc. 103-33, 1995, U.S. Senate, http://www.senate.gov/artandhistory/history/common/generic/Historical_Office_Publications.htm (accessed April 21, 2014).

³Richard Baker, “The History of Congressional Ethics,” in *Representation and Responsibility: Exploring Legislative Ethics*, edited by Bruce Jennings and Daniel Callahan (New York: Plenum Press, 1985), <http://books.google.com/books?id=I4s3diPqvd0C&pg=PA197&lpg=PA197&dq=In+Representation+and+Responsibility:+Exploring+Legislative+Ethics&source=bl&ots=13KGocPJxo&sig=CTcfuFpevj0f8bGDmIxkNncsVuA&hl=en&sa=X&ei=nQNXU4WUJ-a22AXfroCYBQ&ved=0CDUQ6AEwAQ#v=onepage&q=In%20Representation%20and%20Responsibility%3A%20Exploring%20Legislative%20Ethics&f=false> (accessed April 21, 2014), 4.

⁴Ibid., 3.

⁵For more information on Members indicted or convicted of a felony, see Jack Maskell, RL34716, *Status of a Senator Who Has Been Indicted for or Convicted of a Felony* (Washington, DC: Congressional Research Service, October 22, 2008), <http://www.fas.org/sgp/crs/misc/RL34716.pdf> (accessed April 21, 2014). For more information on the enforcement of codes of conduct in the House of Representatives and the Senate, see Straus, *Enforcement of Congressional Rules of Conduct*.

⁶U.S. Congress, Senate, Senate Manual Containing the Standing Rules, Orders, Laws, and Resolutions Affecting the Business of the United States Senate, 88th Cong., 1st sess., S.Doc. 1, 1963, U.S. Senate Select Committee on Ethics, <http://www.ethics.senate.gov/public/index.cfm/history> (accessed April 21, 2014), § 25.1p, 37.

⁷U.S. Congress, Senate, Committee on Rules, Authorizing an Investigation into the Financial, Business or Other Interests or Activities of Present or Former Members, Officers, or Employees of the Senate, vol.1, hearing pursuant to S. Res. 212 and S.Res. 367, 89th Cong., 1st sess., February 4, 1965, quoted in Strauss, CRS Report RS30650; U.S. Congress, Senate, Committee on Rules, Authorizing an Investigation into the Financial, Business or Other Interests or Activities of Present or Former Members, Officers, or Employees of the Senate, vol. 2, hearing pursuant to S. Res. 212 and S. Res. 367, 89th Cong., 1st sess., February 5, 1965, U.S. Senate Select Committee on Ethics. <http://www.ethics.senate.gov/public/index.cfm/history> (accessed April 21, 2014).

⁸Strauss, CRS Report RS30650, 5.

⁹For example, see Senator Wayne Morse, “Resignation of Robert G. Baker As Secretary of the Majority for the Senate,” remarks in the Senate, Congressional Record, vol. 109, part 14, October 8, 1963, quoted in Strauss, CRS Report RS30650, 18942.

¹⁰U.S. Congress, “Inquiry into Financial or Business Interests of any Officer, Employee, or Former Employee of the Senate,” Congressional Record, vol. 109, part 14, October 10, 1963, <https://archive.org/details/congressionalrec109gunit> (accessed April 21, 2014), 19153.

¹¹U.S. Congress, Senate, Committee on Rules and Administration, Financial or Business Interests of Officer or Employees of the Senate, report pursuant to S.Res. 212, 88th Cong., 2nd sess., July 8, 1964, S.Rept. 88-1175, 1964, U.S. Senate Select Committee on Ethics, <http://www.ethics.senate.gov/public/index.cfm/history> (accessed April 21, 2014), 5.

¹²Ibid., parts 1-27; U.S. Congress, Senate, Committee on Rules and Administration, Construction of the District of Columbia Stadium, and Matters Related Thereto, hearings pursuant to S.Res. 212 and S.Res. 367, parts 1-13, 88th Cong., 2nd sess., and 89th Cong., 1st sess., 1964-1965, quoted in Strauss, CRS Report 30650.

¹³U.S. Congress, Senate, Committee on Rules and Administration, Financial or Business Interests of Officers or Employees of the Senate, hearings pursuant to S.Res. 212, parts 1-27, 88th Cong., 1st and 2nd sess., 1963-1964, 1964, U.S. Senate Select Committee on Ethics, <http://www.ethics.senate.gov/public/index.cfm/history> (accessed April 21, 2014), 63-67; U.S. Congress, Senate, Committee on Rules and Administration, Construction of the District of Columbia Stadium, and Matters Related Thereto, hearings pursuant to S.Res. 212 and S.Res. 367, parts 1-13, 88th Cong., 2nd sess., and 89th Cong., 1st sess., 1964-1965, quoted in Strauss, CRS Report 30650.

¹⁴U.S. Congress, Senate, Committee on Rules and Administration, Proposed Rules XLI and XLII to the Standing Rules of the Senate, report to accompany S.Res. 337, 88th Cong., 2nd sess., S.Rept. 88-1125, 1964, U.S. Senate Select Committee on Ethics, <http://www.ethics.senate.gov/public/index.cfm/history> (accessed April 21, 2014).

¹⁵Ibid., 13.

¹⁶Senator Everett B. Jordan, “Amendment of Rule XXV, Relating to the Jurisdiction of Committee on Rules and Administration – Report of a Committee (S.Rept. No. 1147).” Congressional Record, vol. 110, part 12, July 1, 1964, quoted in Strauss, CRS Report 30650, 15661. See also U.S. Congress, “Resolution Amendment of Rule XXV Standing Rules of the Senate Relative to the Jurisdiction of the Committee on Rules and Administration,” Congressional Record, vol. 110, part 12, July 1, 1964, quoted in Strauss, CRS Report 30650, 15661; U.S. Congress, Senate, Committee on Rules and Administration, Amending Rule XXV of the Standing Rules of the Senate Relative to the Jurisdiction of the Committee on Rules and Administration, report to accompany S.Res. 338, 88th Cong., 2nd sess., S.Rept. 88-1147, 1964, U.S. Senate Select Committee on Ethics, <http://www.ethics.senate.gov/public/index.cfm/history> (accessed April 21, 2014).

¹⁷Quotes are found in Martha Angle, “Ethics Panel Called ‘Antiquated,’” *The Washington Star*, December 18, 1976, A11; Robert Sherrill, “We Can’t Depend on Congress to Keep Congress Honest,” *The New York Times Magazine* (July 19, 1970): 5-7, 13-14; Jerry Landauer, “Senate Ethics: Hear No Evil, See No Evil,” *The Washington Star*, September 19, 1976, E3.

¹⁸Jack Anderson, “The Embarrassment of Clean Government,” *The Washington Post*, June 8, 1975, C7; James Gannon and Jerry Landauer, “Despite Sex Scandals, Self-Serving Actions Are the Major Problem,” *Wall Street Journal*, June 15, 1976, 1, 22; “A Congressional Scandal,” *The Washington Star*, September 23, 1976, A12; “Same Old Club,” *Federal Times*, October 4, 1976, <http://newspaperarchive.com/ppclanding/welcomepagev3?gclid=CLuqwcKl9b0CFUQF7AodgjoARg> (accessed April 21, 2014), 9; Anthony Marro, “Congressional Ethics and the Need for Basic Reform,” *The New York Times*, January 30, 1977, E3.

¹⁹U.S. Congress, Senate, Temporary Select Committee to Study the Senate Committee System, *First Report with Recommendations*, 94th Cong., 2nd sess., S. Rept. 94-1395, 1976, U.S. Senate Select Committee on Ethics, <http://www.ethics.senate.gov/public/index.cfm/history> (accessed April 21, 2014), 95-96.

²⁰U.S. Congress. Senate. Rules and Administration Committee, Committee System Reorganization Amendments of 1977, report to accompany S. Res. 4, 95th Cong., 1st sess., S. Rept. 95-1, 1977. U.S. Senate Select Committee on Ethics, <http://www.ethics.senate.gov/public/index.cfm/history> (accessed April 21, 2014), 4-5.

²¹U.S. Congress, “Senate Committee Reorganization,” Congressional Record, vol. 123, February 1, 1977, quoted in Strauss, CRS Report 30650, 2886.

²²U.S. Senate Select Committee on Ethics, “Jurisdiction,” U.S. Senate, <http://www.ethics.senate.gov/public/index.cfm/jurisdiction> (accessed May 6, 2014).

CHAPTER 6

COMPARITIVE ANALYSIS

The primary research question is: Should the Senate be held accountable to the same ethical standards as military officers? The previous chapters presented a brief history of how each institution has developed their respective codes of conduct in order to better understand how these codes evolved. This chapter relates to this research by comparing the current codes of the Senate and military officers to find similarities and differences in the codes and to determine how violations are addressed. Both the Senate and military officers have very similar standards of conduct. In fact, they clearly have similar goals and aspirations of moral and ethical conduct to promote efficiency, transparency, and accountability. Where these organizations differ is in both the mechanisms for enforcement of their codes and the exceptions and exemptions they afford themselves in interpreting their codes.

Understanding that the current edition of the *Senate Ethics Manual* is under revision, for purposes of this study, the *Senate Ethics Manual* passed by the 108th Congress in 2003 will be used. The *Senate Ethics Manual* is 530 pages in length and has nine chapters with various appendices to provide further detail to the Senate rules.

In response to an unethical act by a member of the Senate staff, the Senate felt it necessary to reform its code of conduct. Did the Senate create these standards only as a response to Mr. Baker? It begs the question: If this event had never occurred, would the Senate have felt it important to develop standard conduct and discipline for its members; or would they have taken any action at all? Had the Senate not been compelled by their constituents vice their own internal recognition to hold each other accountable, is it

possible that there would still be no standard for conduct and discipline in the United States Senate? Additionally, was the resignation of Mr. Baker the real reason for this reform, or were there other political reasons for reform? During the same time period as the Baker case, issues like the Watergate scandal, the war in Vietnam, and the Civil Rights movement were leading to a general erosion of public trust in the government. During this same time period, the Senate began to examine their own activities and behavior.¹ On January 18, 1977, Senate Majority Leader Robert Byrd and Minority Leader Howard Baker jointly introduced Senate Resolution (S.Res.) 36, to establish a temporary Select Committee on Official Conduct.² Chapter One of the *Senate Ethics Manual* provides the history, jurisdiction, procedures, role of the Select Committee on Ethics, and the sources of the Senate's standards of conduct. This answers many questions as to what, whom, and how the Select Committee on Ethics can enforce unethical conduct by the Senate. Of note, there is a subsection which outlines the investigation of Mr. Baker and the establishment of the Select Committee on Standards and Conduct. As previously discussed, Mr. Baker was an embarrassment to the Senate and his conduct was used by the Senate at that time to show the American people that his actions could not be tolerated.

The subsequent chapters discuss a myriad of ethical topics to include gifts, conflicts of interest and outside income, prohibition of unofficial office accounts, financial disclosure, political activity, use of the Frank privilege, stationery, and Senate facilities, constituent service, and employment practices, as well as several appendices which discuss the rules and associated federal law, and provides clarification of how and when these rules apply.

Based on the content and organization of their ethics manual, the Senate places great emphasis on money. The ethics manual seems to display transparency to the American people concerning financial issues, but falls short in describing character expected of the Senate in their personal behavior or in the conduct of official duties. In fact, personal behavior is almost absent from their enforceable rules. Therefore, it is more about professional conduct vice expected values-driven behavior. It is as a result of this focus on money that this research led to analysis of Rule 35, the gifts rule, which will be discussed further in this chapter.

By contrast, there are four primary sources to determine officer ethical standards. These sources are: DoD Directive 5500.07, *Standards of Conduct* (November 29, 2007); DoD Directive 5500.07-R, JER, including Changes 1-7. (November 17, 2011); 5 Code of Federal Regulations 2635, *Standards of Conduct of the Executive Branch*; and 5 Code of Federal Regulations Part 3601, *Supplemental Standards of Conduct for Employees of the Department of Defense*. In contrast to the *Senate Manual of Ethics*, the JER has a specific chapter dedicated to ethical conduct which does not limit definitions to official conduct, but includes personal behavior and values. It is the duty of officers to abide by law and regulations, 24 hours a day, seven days a week, for as long as they are in the military. Soldiers obey and promptly execute the legal orders of their lawful superiors. Laws and regulations are part of everyday life. The UCMJ gives military commanders judicial authority, which is essential to the ability to accomplish its mission. The UCMJ is the statute that defines criminal offenses for soldiers.

Once an officer takes his or her oath, they are expected to live the code of ethics 24 hours a day, seven days a week. The character of an officer is paramount in everything

they must do. Character is sometimes defined as taking the right action based on a set of values. For example, the Army espouses that the values of leadership, duty, respect, selfless service, honor, integrity, and personal courage are expected behavior throughout the Army. In fact, these attributes are examined for every Army officer for every evaluation of duty performance. Officers are held to these standards as part of the profession. Having these attributes inculcated throughout the culture of the Army provides the framework required to exercise effective mission command. This ability to trust each other to make the right decisions at every level of leadership in the Army empowers trusted subordinates to make ethical decisions in times of the absence of direct supervision.

In comparison to the Senate, the codes that must be followed by officers also focus very heavily on money. As an officer, I have had the privilege to train and fight alongside many international partners. As an advisor in a Foreign International Defense mission and as an Observer/Controller at the Joint Multinational Readiness Center in Hohenfels, Germany, the issue of gifts frequently arised. In most situations, I would exchange my unit patch with a Georgian or Iraqi Special Forces unit patch, but if the relationship was deeper and more significant, a patch would not be sufficient. I always vetted any ideas of gifts given or received through my local Judge Advocate because I wanted to ensure I was not violating regulations. Often, a foreign officer would present an American officer with a nice gift from their military. When the American officer tried to reciprocate, because of the limitations on price, the given gift was simply not representative of the nation or the officer. In some cases, this was seen as disrespectful to the recipient. Some units have funds allocated to purchase items for these types of

situations, but the majority of units do not have funding for these types of items. As a military, we may need to review which units have these types of funds and which units do not. Another issue is that gifts representative of the unit are usually paid for by individual officers. This issue will not go away. In fact, as the military moves toward regional aligned forces, it will become even more prevalent as units and officers start to establish necessary relationships with multinational partners in their region.

Judge Advocate officers generally do a very professional job of explaining limitations and exceptions to gift-receiving and giving at the unit level. In fact, the military educates service members through annual training requirements, much like the training sessions held for the Senate. So the training of such standards are not really anything negative for either institution. However, what exclusions and exceptions are provided for each institution is very different. To illustrate this point, the gifts rules will now be analyzed.

In order to analyze the gifts rule for the Senate, the January 2013 *An Overview of the Senate Code of Conduct and Related Laws*, from the Senate Select Committee on Ethics website was reviewed. The following information is provided for gifts:

GIFTS

The Senate Gifts Rule applies to all Members, officers, and employees.

Gifts to spouses are not subject to the limits, *unless* there is reason to believe they are given because of the official position of the Member or employee and the Member or employee is aware of the gift.

A “gift” means **anything** of monetary value: *e.g.*, meals, entertainment, services, loans, discounts, travel, lodging, and tickets.

General Rule: Other than from a federal lobbyist or a foreign agent, or an entity that employs or retains such individuals, Members and staff may accept any gift other than cash or cash equivalent valued under \$50.

Subject to the annual limit of less than \$100 per source (excluding gifts of less than \$10).

Members and staff **may not** accept any gift from a federal lobbyist or a foreign agent, or an entity that employs or retains such individuals, **unless** an exception to the Gifts Rule applies. Exceptions to the Gifts Rule include:

Gifts from relatives.

Gifts from other Members or employees (not from subordinates, unless on special occasions).

Gifts from personal friends (gifts valued at more than \$250 require written Ethics Committee approval).

Anything paid for by federal, state, or local government (including federally-recognized Native American Tribes and public universities).

Benefits connected with outside employment or activities not offered or enhanced because of Senate position.

Free attendance at: receptions, widely attended events in connection with official duties, charity events, political fundraisers, and constituent events in the home state.

Waivers are available in “unusual” cases (*e.g.*, weddings), but gifts may need to be disclosed.

Prohibitions on lobbyists:

May not provide a gift unless permitted by a Gifts Rule exception.

May not reimburse for officially-connected travel.

May not provide gifts of personal hospitality (unless the lobbyist qualifies as a personal friend).

May not contribute to legal expense trust funds.

May not make charitable contributions to entities maintained or controlled by Member (*e.g.*, family trust or charity).

May not make charitable contributions on basis of designation by Member (except in lieu of honoraria).

May not underwrite or contribute to office conference, retreat, or similar event.

Gifts **may not** be solicited (5 U.S.C. § 7353).

Gifts from foreign governments or officials (5 U.S.C. § 7342):

Souvenirs and courtesy gifts may be accepted if valued at \$100 or less.

Gifts valued at more than \$100 may only be accepted on behalf of the U.S. government and turned over to the Secretary of the Senate within 60 days.

Gifts and approved in-country travel expenses valued at more than \$100 must be reported in writing to the Ethics Committee.

NEVER ACCEPT ANYTHING OF VALUE THAT IS OFFERED IN CONNECTION WITH AN OFFICIAL ACTION TAKEN OR ASKED TO BE TAKEN (18 U.S.C. § 201, **CRIMINAL STATUTE**).³

After analyzing the above rules, it was necessary to read Rule 35 on Gifts and the Gifts section addressed in the *Senate Ethics Manual*. This information was then compared to the aforementioned laws and regulations for officers. Remarkably, there were many similarities. The following flowchart is provided to depict how some officers are instructed at the Army's Command and General Staff College, concerning gifts:

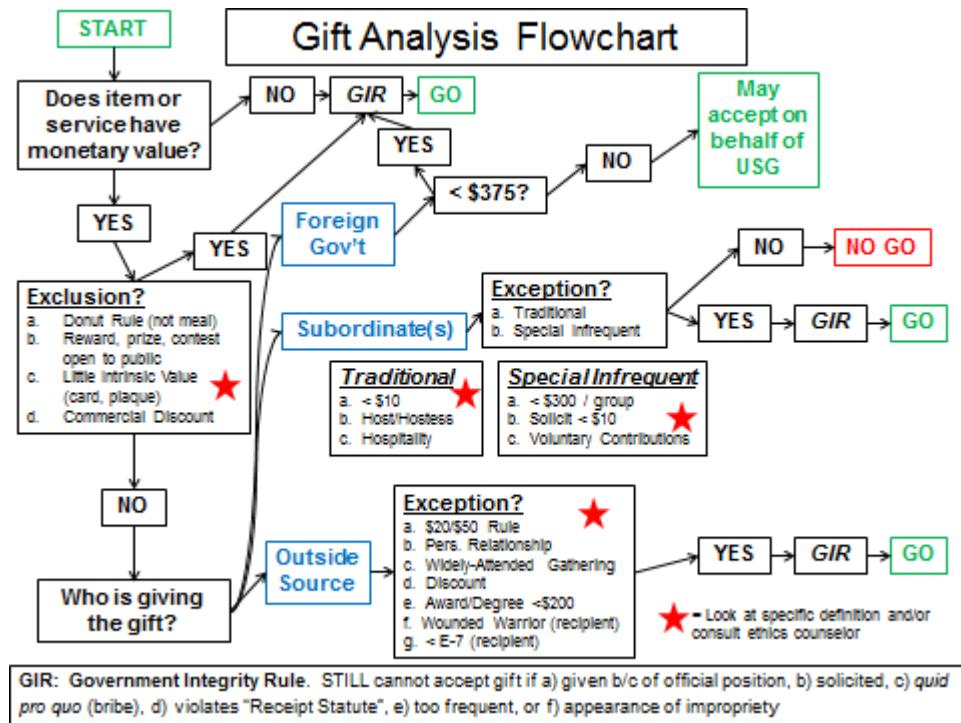


Figure 1. Gift Flow Chart

Source: Major Michael Friess, Judge Advocate Instructor, United States Army Command and General Staff College, Fort Leavenworth, KS, "Gift Analysis Flow Chart," e-mail to author, April 7, 2014.

The exceptions above and the dollar amounts associated with gifts seem fairly consistent with that of the Senate, excluding the exceptions to the gifts rule. On this point, the research will refer to the *Senate Ethics Manual* which states: “The Gifts Rule contains 23 exceptions. The following gifts are expressly excluded from the Rule’s limitations:”⁴

- (1) gifts for which the recipient pays the market value, or does not use and promptly returns;
- (2) political contributions reported under the law, or attendance at a fundraising event sponsored by a political organization;
- (3) gifts from relatives;

- (4) anything, including personal hospitality, provided by an individual on the basis of a personal friendship unless the Member, officer, or employee has reason to believe that, under the circumstances, the gift was provided because of the official position of the Member, officer, or employee and not because of the personal friendship (see “Personal Friendship” Section for additional criteria);
- (5) contributions or payments to an approved legal expense trust fund;
- (6) gifts from another Member, officer, or employee of the Senate or House;
- (7) food, refreshments, lodging, and other benefits that result from the outside business or employment (or other activities not connected with official duties) of the Member, officer, or employee, or spouse thereof that are customarily provided and that are not offered or enhanced by the official position of the Member, officer, or employee; that are customarily provided by a prospective employer in connection with bona fide employment discussions; or that are provided by a political organization in connection with a fundraising or campaign event sponsored by the organization;
- (8) pension and other benefits resulting from continued participation in an employee welfare and benefits plan maintained by a former employer;
- (9) informational materials, such as books, articles, periodicals, audio or videotapes, sent to the office;
- (10) awards or prizes won in contests open to the public;
- (11) bona fide nonmonetary awards (including honorary degrees) presented in recognition of public service, and associated food, refreshments, and entertainment provided in the presentation of such degrees and awards;
- (12) donations of products from the home State which are intended primarily for promotional purposes (display or distribution) and are of minimal value to any individual recipient;
- (13) training, including food and refreshments furnished to all attendees as an integral part of the training, in the interest of the Senate;
- (14) bequests, inheritances, and other transfers at death;
- (15) any item whose receipt is authorized by the Foreign Gifts and Decorations Act, the Mutual Educational and Cultural Exchange Act, or any other statute;
- (16) anything paid for by Federal, State, or local government, or secured by the Government under a Government contract;

- (17) personal hospitality, other than from a registered lobbyist or agent of a foreign principal;
- (18) free attendance at a widely attended event that is officially related to Senate duties or at a widely attended charity event;
- (19) opportunities and benefits which are:
 - (a) available to the public or to a class consisting of all Federal employees;
 - (b) offered to members of a group or class in which membership is unrelated to congressional employment;
 - (c) offered to members of an organization, such as an employees' association or congressional credit union, in which membership is related to congressional employment and similar opportunities are available to large segments of the public through organizations of similar size;
 - (d) offered to any group or class that is not defined in a manner that specifically discriminates among Government employees on the basis of branch of Government or type of responsibility, or on a basis that favors those of higher rank or rate of pay;
 - (e) commercial loans from banks or other financial institutions on terms generally available to the public;
 - (f) reduced membership or other fees for participation in organization activities offered to all Government employees by professional organizations;
- (20) a plaque, trophy, or other item that is substantially commemorative in nature and which is intended solely for presentation;
- (21) in an unusual case, anything for which a waiver is granted by the Committee;
- (22) food or refreshments of a nominal value offered other than as part of a meal;
- (23) an item of little intrinsic value such as a greeting card, baseball cap, or T-shirt.”⁵

Many of the exceptions seem to make perfect sense, while others seem more like ways to circumvent the rule entirely. There are many circumstances provided which establish the need to disclose gifts; however, it would be extremely difficult for the Select Committee on Ethics to know about many of the actions and self-regulate due to the

related rules of disclosure in light of these exceptions. The difficulties in reporting a potential violation to the committee causes even more of a lack of transparency.

Reporting will be discussed in more detail later in this research. When reviewing examples provided to further explain these exemptions, it becomes even more convoluted, and in some ways outrageous as far as what is permissible. For example, situations pertaining to personal hospitality. The *Senate Ethics Manual* states:

As long as the hospitality is truly personal, that is, extended by an individual (other than a lobbyist or foreign agent) at that individual's residence (or other property of the individual) and at his or her own expense for a non-business purpose, a Senator or staffer may accept it, whether or not the host is present at the time. As with gifts of little value (less than \$10), repetitive acceptance of personal hospitality from the same individual, even though permitted by the Gifts Rule, could be improper, depending upon the totality of the circumstances.

Example 17. Mr. and Mrs. *Y* invite Senator *C* and family to fly down to Miami on the *Y*s' private plane, stay at the *Y*s' nearby vacation home, and use their yacht for deep sea fishing. The *Y*s' provision of food and lodging at their home and pleasure boating would all be exempt from the Gifts Rule as personal hospitality. The flight to Miami, however, would be a substitute for commercial transportation. It would thus be a nonexempt gift, valued at the first class fare to Miami,⁶ and subject to the \$50 gift limit.

Example 18. The *X* Corporation maintains a corporate hunting lodge, available to its executives and their guests. An officer of the corporation invites Senator *D* to be his guest at the lodge. Since the lodge is owned by the corporation and not the individual officer, this offer would not fall under the personal hospitality exception.⁷

Example 19. The *W* family owns a beach house at Rehobeth, which they do not rent out but use for family vacations. Mr. *W* is a registered lobbyist. The *Ws* invite staffer *E* to use the house during a week when the *Ws* will be elsewhere. *E* may not accept because Mr. *W* is a lobbyist.

Example 20. The owner of a guest house in Aspen offers Senator *F* complimentary lodging there. Since the guest house is a commercial establishment, this offer would not constitute personal hospitality and would be subject to the gift limit. Although a Member, officer, or employee may not accept an offer of a week's lodging from a lobbyist under the personal hospitality exception, a Member, officer, or employee may accept an offer of a week's lodging from a lobbyist who is a personal friend, under the exception for gifts

based on personal friendship, as long as the total value of the lodging does not exceed \$250 and the requirements for use of the exception are otherwise met.⁸

As an example of how the Select Committee on Ethics has tried to publicly change the perception of the American people, the Stop Trading on Congressional Knowledge Act of 2012 was signed into law on April 4, 2012, and included new requirements for the Senate. The fact that this act had to be written shows a very different standard for the Senate and that of military officers. The rest of the nation has long been legally forbidden from insider trading. The other interesting issue surrounding this is the timing of its passage. This law was passed just months prior to national elections and many media outlets were reporting through polls the low confidence of the American people in Congress.

The most recent act related to gifts found during this research is the Foreign Gifts and Decorations Act (5 U.S.C. 7342, January 7, 2014). This law requires the Select Committee on Ethics to compile a list of certain tangible gifts of travel that Senate Members, officers, and employees, or their spouses or dependents, have accepted from a foreign government or a multinational organization during the preceding year. At first glance, it would seem like this was yet another attempt at transparency. This information is sent to the Secretary of State for publication in the *Federal Register* by January 31st of each year. Additionally, this Act may be of great benefit to the State Department and their efforts in global diplomacy. Members of the Senate who accept these types of gifts may not be privy to or understand the totality of the issues or decisions an Ambassador may have in a foreign country. Therefore, this disclosure also assists the Ambassador and his or her staff to identify any potential red flags which may usurp or misguide the State Department's intent for a given country. This transparency is a good thing as these

Ambassadors are direct representatives of the President of the United States in their respective country and oftentimes their agenda may not be aligned with other intergovernmental agents due to competing interests.

That said, the Senate may have a better understanding of the issues based on years of experience in the Senate. In contrast, a presidentially-nominated Ambassador with no Foreign Service experience may not be the best person to decide these matters. In these situations, at least the Deputy Ambassador would be a career Foreign Service employee with years of experience and could advise the Ambassador.

This chapter broadly analyzed the code of ethics for both the Senate and Officers. There were remarkable similarities, but it is the differences and how violations are addressed which may cause a different perception by the American people if an officer and Senator are treated differently under the same circumstances. The next chapter will provide jurisdictional information on how ethics are enforced in both the Senate and with Officers. There will also be an aggregate study of ethical violations reported from 2009-2013, and violations of the UCMJ by officers. This will provide a context of the type of violations, trends, and the consequences of violations to show a comparison and determine if the Senate is already being held accountable for unethical conduct in the same manner as officers.

¹Leroy N. Rieselbach, “In the Wake of Watergate: Congressional Reform?,” *The Review of Politics* 36, no. 3 (July 1974), 391.

²U.S. Congress, “Establishment of Special Committee to Propose a Code of Conduct,” Congressional Record, vol. 123, part 2, January 18, 1977, quoted in Strauss, CRS Report 30650, 1361-1363.

³U.S. Congress, Senate, Select Committee on Ethics, *Senate Ethics Manual*, 108th Cong., 1st sess., 2003, U.S. Senate, <http://www.ethics.senate.gov/public/index.cfm?a=>

Files.Serve&File_id=f2eb14e3-1123-48eb-9334-8c4717102a6e (accessed April 21, 2014), ch. 2, 22-64.

⁴U.S. Congress, Senate, Select Committee on Ethics, *Senate Ethics Manual*, 25-27.

⁵Ibid.

⁶See Interpretative Ruling No. 412 (August 11, 1986) in U.S. Congress, Senate, Select Committee on Ethics, *Senate Ethics Manual*.

⁷See Interpretative Ruling No. 162 (August 3, 1978) in U.S. Congress, Senate, Select Committee on Ethics, *Senate Ethics Manual*; Interpretative Ruling No. 76 (October 5, 1977) in U.S. Congress, Senate, Select Committee on Ethics, *Senate Ethics Manual*.

⁸U.S. Congress, Senate, Select Committee on Ethics, *Senate Ethics Manual*, ch. 2, 25-27.

CHAPTER 7

ACCOUNTABILITY AND COMPARISONS OF ETHICAL VIOLATIONS, 2009-2013

The primary research question is: Should the Senate be held accountable to the same ethical standards as military officers? The previous chapter broadly analyzed the code of ethics for both the Senate and officers to provide needed perspective for this chapter. This chapter will provide information on how ethical violations are enforced and provide a five-year analysis of ethical violations by the Senate and military officers to compare and contrast accountability.

The major difference between the Senate and military officers is the fact that officers are subject to prosecution under the UCMJ for ethical violations as it relates to personal behavior such as Article 133 (Conduct unbecoming an officer and a gentleman) or Article 134 (a general article used to prosecute myriad offenses such as adultery). The Senate is simply not held to these same standards of personal behavior. Senator Patrick Leahy of Vermont stated, “American military justice is the best in the world and includes open trials, right to counsel, and judicial review.”¹ Would this same process be worthwhile in the Senate?

Pursuant to changes made since 1977, the Select Committee on Ethics currently has jurisdiction over the following areas:

1. receive complaints and investigate allegations of improper conduct which may reflect upon the Senate, violations of law, violations of the Senate Code of Official Conduct, and violations of rules and regulations of the Senate, relating to the conduct of individuals in the performance of their duties as Members of the Senate, or as officers or employees of the Senate, and to make appropriate findings of fact and conclusions with respect thereto;
2. recommend, when appropriate, disciplinary action against Members and staff;²

3. recommend rules or regulations necessary to insure appropriate Senate standards of conduct;
4. report violations of any law to the proper Federal and State authorities;
5. regulate the use of the franking privilege in the Senate;
6. investigate unauthorized disclosures of intelligence information;
7. implement the Senate public financial disclosure requirements of the Ethics in Government Act;
8. regulate the receipt and disposition of gifts from foreign governments received by Members, officers, and employees of the Senate;
9. render advisory opinions on the application of Senate rules and laws to Members, officers, and employees;
10. for complaints filed under the Government Employee Rights Act of 1991 respecting conduct occurring prior to January 23, 1996, review, upon request, any decision of the Senate Office of Fair Employment Practices;³
11. develop and implement programs for Members, officers, and employees to educate them about standards of conduct applicable in the performance of their official duties;⁴
12. "conduct ongoing ethics training and awareness programs for Members of the Senate and Senate staff";⁵ and
13. issue an annual report on the number of alleged violations of Senate rules received from any source, including the number raised by a Senator or staff of the committee, and including the number of allegations dismissed or on which the committee took the specific actions.⁶

The procedures for the Select Committee on Ethics are established pursuant to S.Res. 338 (88th Congress, from January 3, 1963 to January 3, 1965), as amended; Public Law 93-191;⁷ S.Res. 400 (94th Congress, from January 3, 1975 to January 3, 1977);⁸ and 5 U.S.C. § 7342.⁹ The Ethics Committee may initiate an inquiry or investigate allegations brought by Senators, Senate officers, Senate staff, or outside individuals and groups.

While the committee does not have formal procedural requirements for filing a complaint, the committee can issue public statements regarding a specific inquiry. If the

committee chooses not to issue a public statement, all allegations are treated confidentially and the committee has a practice of neither confirming nor denying that a matter is before the committee. “Upon completion of its investigative process, the Committee may recommend to the Senate or party conference an appropriate sanction for a violation or improper conduct, including, for Senators, censure, expulsion, or party discipline and, for staff members, termination of employment.”¹⁰

In 1977, the Senate agreed to S. Res. 110, which created the Code of Official Conduct. Title II of S. Res. 110 amended S. Res. 338, the 1964 resolution that created the procedures of the Select Committee on Standards and Conduct, which became the Select Committee on Ethics. The amendments required the Select Committee to receive complaints and investigate alleged violations of the Senate Code of Official Conduct and to publish necessary regulations to implement the code. Title II also required the publishing of advisory opinions in the Congressional Record, if requested by specified individuals.¹¹

The source of military law comes from two provisions of the United States Constitution; those vesting certain powers in the legislative branch, and those granting certain authority to the executive branch. Along with the Constitution, there are other sources, both written and unwritten, that govern the military. International law and numerous treaties affecting the military have contributed to defining the law of war. Congress contributed the UCMJ and other statutes; Executive orders, including the Manual for Courts Martial (MCM); joint and service regulations such as the JER; and usages and customs of the Armed Forces form the foundation of military law.¹²

Civilian and military courts have contributed decisions to clarify the gray areas of military law. The UCMJ is federal law, enacted by Congress. The law authorizes the Commander-in-Chief (President of the United States) to implement the provisions of the UCMJ. The President does this via an executive order known as the MCM. Military discipline is founded upon self-discipline, respect for authority, and the embracing of the professional Army ethic with its supporting individual values. Military discipline is developed through individual and group training to create a mental attitude that will result in proper conduct and prompt obedience to lawful military authority. Soldiers demonstrate their discipline in many ways, including the prompt and correct execution of orders and compliance with regulations.¹³

When soldiers get into trouble, they need firm but constructive support and guidance for correcting the problem at hand; they are not seeking sympathy or self-pity. Soldiers expect to see a role model, someone with knowledge of what needs to be done, the physical conditioning to lead by example, the self-discipline to set standards, and the maturity to recognize, acknowledge, and reward success.¹⁴

The above information is directly from the revised *Soldier's Guide* which is provided as a standing example of the standards expected of members of the Army. These standards and accountability are what instills trust and confidence in the armed forces. Should it be the same members of the Senate who lead these forces?

Commissioned officers are direct representatives of the President. The President uses commissions as legal instruments to appoint and exercise direct control over qualified people who act as his legal agents and help him carry out duties. The military retains this relationship with the President through its commissioned officers. The commission serves as the basis for a commissioned officer's legal authority.

Commissioned officers command, establish policy, and manage national resources.¹⁵

Responsibility is the legally established and moral obligation a soldier assumes for his own actions, accomplishments and failures. Leaders also assume responsibility for the actions, accomplishments, and failures of their units and decisions. Above all, the leader is responsible for accomplishing his assigned missions.¹⁶

Related to responsibility is accountability. This is the requirement to answer to superiors (and ultimately the American people) for mission accomplishment, for the lives and care of assigned soldiers, and for effectively and efficiently using national resources. Leaders are accountable for what they do or fail to do.¹⁷

The MCM contains the UCMJ and instructs military lawyers and judges on how to conduct courts-martial. It is also where non-judicial punishment (Article 15) is found. There are a total of 140 articles in the MCM. The MCM explains what conduct is in violation of the UCMJ, sets forth rules of evidence, contains a list of maximum punishments for each offense and explains types of courts-martial. Articles 1 through 146 are in the following categories:

- General Provisions—Articles 1 through 6.
- Apprehension and Restraint—Articles 7 through 14.
- Non-judicial Punishment—Article 15
- Court-Martial Jurisdiction—Articles 16 through 21.
- Composition of Courts-Martial—Articles 22 through 29.
- Courts-Martial Procedures and Sentences—Articles 30 through 58.
- Post-Trial Procedures and Review of Courts-Martial—Articles 59 through 76.
- Punitive Articles—Articles 77 through 133. Also known as the “punitive offenses,” these describe specific offenses that can result in punishment by court-martial or non-judicial punishment.

- Article 134 is a “catch-all” that covers any offenses not specifically named in Articles 77-133.

- Miscellaneous Provisions—Articles 135 through 146.¹⁸

Within the UCMJ is a provision for punishing misconduct through judicial proceedings like a court-martial. The UCMJ also gives commanders the authority to impose non-judicial punishment, described in the UCMJ under Article 15. Article 15 provides commanders an essential tool in maintaining discipline. The Article allows commanders to impose punishment for relatively minor infractions. Only commanders may impose punishment under Article 15.¹⁹ This idea of non-judicial punishment is extremely important in insuring good order and discipline and it poses the question, if given this authority, would the Select Committee of Ethics better hold the Senate accountable for misconduct?

There are several tools provided to commanders to keep service members accountable for their ethical misconduct. Imagine if the Select Committee on Ethics had similar non-judicial punishment and adverse administrative actions to address conduct in the Senate. Of course, a Senator is elected by the people of their state and if they were discharged or punished, this could create problems with state initiatives and would require more frequent special elections to replace those discharged due to misconduct. Arguably, the Senate is already held accountable for unsatisfactory performance through the electoral process, but this relies on the people having the transparency of the Senate to make informed decisions about their vote. Do we have this transparency for the voter? An examination of what has been reported by the Senate for the past five years will address that question.

From 2009 to 2013, the Select Committee of Ethics reported the following, in accordance with the Honest Leadership and Open Government Act of 2007:

- 1) The number of alleged violations of Senate rules received from any source, including the number raised by a Senator or staff of the Committee: 291.
- 2) The number of alleged violations that were dismissed –
 - (A) For lack of subject matter jurisdiction or in which, even if the allegations in the complaint are true, no violation of Senate rules would exist: 214.
 - (B) Because they failed to provide sufficient facts as to any material violation of the Senate rules beyond mere allegation or assertion: 94.
- 3) The number of alleged violations for which the Committee staff conducted a preliminary inquiry: 20.
- 4) The number of alleged violations for which the Committee staff conducted a preliminary inquiry that resulted in an adjudicatory review: 0.
- 5) The number of alleged violations for which the Committee staff conducted a preliminary inquiry and the Committee dismissed the matter for lack of substantial merit: 14.
- 6) The number of alleged violations for which the Committee staff conducted a preliminary inquiry and the Committee issued private or public letters of admonition: 3.
- 7) The number of matters resulting in a disciplinary sanction: 0.²⁰

In analysis, it seems that the Committee dismissed more violations than they took action on. This is generally true for the military as well. These figures included any matters that were carried over from previous years. Out of all of the alleged violations, the Committee staff conducted 20 preliminary inquiries which resulted in only three private or public letters of admonition being issued.

After analyzing the information released, it becomes very apparent that this information does not provide many details to the American people. Therefore, it would be very difficult for the American people to have the ability to hold violators accountable

during election periods. A few questions which would provide more transparency would be: What were the alleged violations? Were there trends, such as involvement of a particular Senator? What were the jurisdictional problems? If there are jurisdictional problems, what is the Committee doing to take care of these issues? Again, if there is nothing negative to report, than the author recommends, the Senate become better with articulating their adherence to the code of ethics in which the American people expect them to adhere to. After analyzing the information presented above, it was necessary to find similar information that would be comparable to the potential ethical conduct violations for military officers over the same time period. The information was pursued through the Army Judge Advocate General Corps which assisted greatly by providing all Army officer courtmartial cases and corresponding dispositions for the past five years. For purposes of this research, all proven violations of the UCMJ by officers are considered *de facto unethical* behavior and contrary to the Army Values. The information provided is an aggregate study because many of the accused officers had multiple counts of several different violations of the UCMJ.

Over this five-year time period, there were 2,104 violations of the UCMJ by Army officers reported with less than 50 percent of those officers being found guilty. Out of all of the violations reported, there were 189 officers found guilty from 2009-2013. Of these officers, 51 were found in violation of Article 133 which prohibits conduct unbecoming an officer and a gentleman. In fact, the Senate is not criminally held to a similar standard. There is discussion about conduct unbecoming a Senator, but there again is no enforcement mechanism to hold Senators accountable for their behavior other than the loss of their constituency. In comparison, “Any commissioned officer, cadet, or

midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.”²¹ The elements that must be met are: “(1) That the accused did or omitted to do certain acts; and (2) That, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman. As used in this article, ‘gentleman’ includes both male and female commissioned officers, cadets, and midshipmen.”²² The nature of the offense is described as:

conduct that violates this article is action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer’s character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person’s standing as an officer.²³

There are certain moral attributes common to the ideal officer and the perfect gentleman. A lack of these attributes is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty. Not everyone is or can be expected to meet unrealistically high moral standards. However, there is a limit of tolerance based on customs of the service and military necessity which the personal standards of an officer, cadet, or midshipman cannot fall without seriously compromising the person’s standing as an officer, cadet, or midshipman or the person’s character as a gentleman. This article prohibits conduct by a commissioned officer, cadet or midshipman which, taking all the circumstances into consideration is compromising. This article includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and a gentleman. Thus, a commissioned officer who steals property violates both this article and Article 121. Whenever the offense charged is the same as a specific offense set forth in the UCMJ, the elements of proof are the same as those set forth in the paragraph which treats that specific offense, with the additional

requirement that the act or omission constitutes conduct unbecoming an officer and gentleman.²⁴ The maximum punishment is dismissal, forfeiture of all pay and allowances, and confinement for a period not in excess of that authorized for the most analogous (similar) offense for which a punishment is prescribed in the UCMJ, or, if none is prescribed, for one year.²⁵

As previously stated, Article 134 can be used to prosecute adultery. This is another example of a punitive consequence holding an officer to a standard which the Senate does not impose on themselves. According to the 2012 MCM, adultery has been committed when the following elements have been met:

(1) That the accused wrongfully had sexual intercourse with a certain person; (2) That, at the time, the accused or the other person was married to someone else; and (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.²⁶

Additionally, the manual describes adultery as clearly unacceptable conduct, and it reflects adversely on the service record of the military member. Maximum punishment for this conduct can result in dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year.²⁷ Of note, adultery is not criminal in nature unless it impacts good order and discipline. There were nine officers charged with this offense during the previous five years. This specific article generates many opinionated discussions both inside and outside the military. Some feel that this type of issue is personal and not the business of anyone other than those involved. Some agree with the current article and feel that this is unacceptable conduct which should be punished. Regardless, members of the Senate are not held to this standard.

Arguably, a Senator's sex life is no one's business. However, if the Senator's spouse cannot trust the Senator, then should the American people? If not a violation of the Senate rules, this appearance of impropriety can certainly damage the perception and confidence the people have for the Senate.

On June 14, 2013, Gallup Editor-in-Chief Frank Newport revealed that out of 16 institutions measured, Americans are most confident in the military, at 76 percent, and least confident in Congress, at 10 percent.²⁸ On June 23, 2011, another Gallup report stated that the military has been the top ranked institution each year since 1998, and from 1989 to 1996. In 1997, when small business was added to the survey for the first time, it edged out the military by 63 percent to 60 percent.²⁹ The American people's confidence in the Senate can absolutely be restored, but not unless they change their approach to their own code of ethics and begin to provide public examples of how they enforce their own rules with its members. and impose stricter enforceable rules.

This chapter provided information on how ethical violations are enforced and provided a five-year analysis of ethical violations by the Senate and military officers to compare and contrast accountability on how ethical violations are enforced to compare and contrast accountability. The next and final chapter of this research provides conclusions and recommendations to determine if the Senate should be held to the same ethical standards as military officers.

¹ Senator Patrick Leahy, Chairman, Senate Judiciary Committee, "DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism," 6 December 2001.

²In addition to bringing matters to the full Senate for expulsion, censure, or reprimand, the Committee, pursuant to S.Res. 338 (88th Congress) sec. 2(a)(3) and 2(d)(3), as amended by S.Res. 222 (106th Congress), also has the authority to issue, on its own, "letters of admonition" for misconduct not warranting full Senate discipline (i.e., "if

a violation is inadvertent, technical or otherwise of deminimis nature” U.S. Congress, Senate, Select Committee on Ethics, *Senate Ethics Manual*, 15. For more information on “Letters of Admonition,” see U.S. Congress, Senate, S.Prt. 111-53, Rules of Procedures, Select Committee on Ethics, 23 February 1978, 111th Cong., 2nd sess., U.S. Senate Select Committee on Ethics, http://ethics.senate.gov/downloads/pdffiles/small_books/RulesOfProcedure.pdf (accessed April 21, 2014), committee rules 3(g)(2) and 4(g)(2)(iii) and (iv); Straus, CRS Report RL30764.

³U.S. Congress, Senate, Select Committee on Ethics, *Senate Ethics Manual*, 4.

⁴Ibid., 17; U.S. Congress, “Official Conduct Amendments of 1977,” Congressional Record, vol. 123, part 8, April 1, 1977, quoted in Strauss, CRS Report 30650, 10044-10068.

⁵U.S. Congress, Public Law 110-81, sec. 553, 121 Stat. 773, September 14, 2007. 2 U.S.C. § Justia, <http://law.justia.com/codes/us/2010/title2/chap4/sec72a-1h> (accessed April 21, 2014), 72a-1h.

⁶Ibid., 72a-1i.

⁷U.S. Congress, Public Law 93-191, 87 Stat. 737, December 18, 1973, Justia, <http://law.justia.com/codes/us/2010/title2/chap4/sec72a-1h> (accessed April 21, 2014) amended then current law on franked mail and required that the Select Committee on Standards and Conduct (now the Select Committee on Ethics) provide “guidance, assistance, advice, and counsel, through advisory opinions or consultations, in connection with eh mailing or contemplated mailing of franked mail . . .” For more information on franked mail, see Matthew Eric Glassman, RL34274, *Franking Privilege: Historical Development and Options for Change* (Washington, DC: Congressional Research Service, September 8, 2008, <http://books.google.com/books?id=DF3vT-icGe0C&pg=PR4&dq=CRS+Report+RL34274&hl=en&sa=X&ei=XgRXU7XYEO7s2AWDk4CQCw&ved=0CEsQ6AEwAg#v=onepage&q=CRS%20Report%20RL34274&f=false> (accessed April 21, 2014); Matthew Eric Glassman, RS22771, *Congressional Franking Privilege: Background and Recent Legislation*, quoted in Jacob R. Strauss and Matthew E. Glassman, RS43477, *Social Media in the House of Representatives: Frequently Asked Questions* (Washington, DC: Congressional Research Service, April 16, 2014), <http://www.fas.org/sgp/crs/misc/R43477.pdf> (accessed April 21, 2014).

⁸S.Res. 400 (94th Congress), restricted the unauthorized disclosure of intelligence information. The Select Committee on Ethics was specifically tasked “to investigate any unamortized disclosure of intelligence information by a Members, officer or employee of the Senate.” For more information, see U.S. Congress, Senate, Committee on Rules and Administration, Proposed Standing Committee on Intelligence Activities, report to accompany S.Res. 400, 94th Cong., 2nd sess., April 29, 1976, S.Rept. 94-470, 1976, U.S. Senate Select Committee on Ethics, <http://www.ethics.senate.gov/public/index.cfm/history> (accessed April 21, 2014), 45; U.S. Congress, “Proposed Standing Committee on

Intelligence Activities,” debate in the Senate, Congressional Record, vol. 122, part 12, May 19, 1976, quoted in Strauss, CRS Report 30650, 14643-14679.

⁹5 U.S.C. § 7342 covers the receipt and disposition of foreign gifts and decorations given to federal employees as defined by 5 U.S.C. § 2105, including Members of Congress. U.S. Congress, House, 5 U.S.C. § 7342, *Receipt and Disposition of Foreign Gifts and Decorations*, Cornell University Law School, <http://www.law.cornell.edu/uscode/text/5/7342> (accessed April 21, 2014).

¹⁰U.S. Congress, Senate, Select Committee on Ethics, *Senate Ethics Manual*, 4. For detailed Select Committee procedures, see U.S. Congress, Senate, Select Committee on Ethics, Rules of Procedure, committee print, adopted February 23, 1978, revised November 1999, Reprinted March 2007, 110th Cong., 1st sess., S.Prt. 110-17, 2007, U.S. Senate Select Committee on Ethics, <http://www.ethics.senate.gov/public/index.cfm/history> (accessed April 21, 2014). Rules of Procedure have historically been printed on a yearly basis, with the most recent reprinting in 2007. For more information on enforcement of rules of conduct, see Straus, CRS Report RL30764.

¹¹U.S. Congress, Senate. Special Committee on Official Conduct, Senate Code of Official Conduct, report to accompany S.Res. 110, 95th Cong., 1st sess., S.Rept. 95-49, 1977, U.S. Senate Select Committee on Ethics, <http://www.ethics.senate.gov/public/index.cfm/history> (accessed April 21, 2014), 2-3.

¹² Headquarters, Department of the Army, Field Manual 7-21.13, *The Soldier’s Guide* (Washington, DC: US Government Printing Office, 20 September 2011), 3-31

¹³ Headquarters, Department of the Army, Field Manual 7-21.13, *The Soldier’s Guide* (Washington, DC: US Government Printing Office, 2004), 3-31.

¹⁴Ibid.

¹⁵Ibid., 3-4.

¹⁶Ibid., 3-12.

¹⁷Ibid., 3-13.

¹⁸Ibid., 3-132.

¹⁹Ibid., 3-136.

²⁰U.S. Congress, Senate, “Annual Reports,” U.S. Senate Select Committee on Ethics, <http://www.ethics.senate.gov/public/index.cfm/annualreports> (accessed 17 April 2014).

²¹Department of Defense, *Manual for Courts-Martial United States* (Washington, DC: US Government Printing Office, 2012), http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012 (accessed April 21, 2014), IV-99.

²²Ibid.

²³Ibid.

²⁴Ibid.

²⁵Ibid., IV-100.

²⁶Department of Defense, *Manual for Courts-Martial United States*.

²⁷Ibid., 387-388.

²⁸Frank Newport, “Americans Have Most Confidence in Military, Least in Congress,” Gallup Inc., 14 June 2013, <http://www.gallup.com/video/163076/americans-confidence-military-least-congress.aspx> (accessed April 19, 2014).

²⁹Ibid.

CHAPTER 8

CONCLUSIONS AND RECOMMENDATIONS

The purpose of this research was to determine if the Senate should be held accountable to the same ethical standards as military officers. To determine the answer to this question, the history of ethics for both institutions was provided to determine how these institutions developed their separate codes of conduct. Next, the current codes were analyzed to determine similarities, differences, and identify particular outliers. The comparison showed that while these codes are similar in many ways, the manner in which members are held accountable for violations is very different. The previous Senate Committee was thought of as a group lacking the teeth to enforce. The Select Committee on Ethics remains unable to appropriately hold the Senate accountable for unethical conduct. The Senate lacks transparency and affords themselves exceptions to rules which are not allowed by officers. In fact, some of the exceptions seem to undermine the very purpose of their stated rules. This chapter will provide recommendations and conclusions as it relates to the research in this thesis.

It is possible that through research and articles like this thesis, the Senate will take these ideas into consideration as they update their ethics manual. Even with the establishment of the Select Committee and the efforts of the Senate to internally monitor and investigate violations this still may not be enough to regain the confidence of the American people. How can the Senate regain this trust? One way might be to adopt a commitment to ethical conduct and accountability as the military officer corps has for over two centuries.

The military's purpose is to fight and win our nation's wars; this is not the job of the Senate. However, the Senate can require the military to fight wars, hold officers accountable for actions, and even approve senior officer promotions, assignments, and positions. As our civilian leadership, should they not be held to the same standards to which they hold the Army? Do the American people not expect the same ethical conduct by members of the Senate who are expected to represent their states 24 hours a day, seven days a week? The Select Committee on Ethics should consider establishing formal procedural requirements for filing a complaint. This study demonstrates that there is disparity between the Senate and the military regarding how violators of the respective standards of conduct are punished, as well as the exclusions and exemptions the Senate affords itself but not military officers. Most notable is the disparity between how each institution is held accountable. If an officer is found guilty of violating the UCMJ, the officer is punished based on the violations. Depending on the nature of the violation, the officer may also be found guilty of conduct unbecoming an officer and a gentleman. This demonstrates the fact that officers hold themselves to a higher standard of conduct. This standard is agreed upon by taking the oath of office. The Senate also takes an oath, but tenure, political atmosphere, party affiliation, etc. may impact the way a violator is punished or not punished.

There is no doubt, that as seen in recent Gallup Polls, the American people lack confidence and trust for the Senate. In some studies, Congress was voted as the worst institution in regards to confidence. To regain that confidence there must be change. In his October 2007 article "Cleaning House: Congressional Commissioners for Standards," for the *Yale Law Journal*, Josh Chafetz presented an idea to assist in holding the Senate

accountable. In his writing, Mr. Chafetz, analyzed the British position of the Parliamentary Commissioner for Standards and recommended a variation of this concept and called it the Congressional Commissioners for Standards. Chafetz stated:

To address the inadequacies of the current ethics committees, Congress should create a Commissioner for Standards for each house of Congress, structured to improve upon the British model . . . Ultimately, this office would serve to regularize and strengthen the enforcement of congressional ethics, while keeping final responsibility within Congress itself. The result would likely be an increase in public trust in the most representative branch of our government. That, surely, is a worthwhile innovation.¹

Whether there are or are not ethical issues with the Senate does not currently change the fact that the American people have formed an opinion. To change this opinion, the Senate should hold themselves accountable to the same ethical standards as military officers. If the military has held the highest confidence of the American people for several years, then the Senate may want to make changes to their current system to resemble the standards set and enforced by officers. As discussed, officers are held accountable by the JER and UCMJ. Is it plausible or possible for the Senate to draft a Uniformed Code of Congressional Justice?

More research should be conducted on how the Senate makes and enforces ethical standards. Mr. Chafetz's idea for a commissioner to regulate and enforce standards seems like a step in the right direction. This would require more research for the Senate to determine how to implement change. The idea of a Uniformed Code of Congressional Justice may seem farfetched, but what if it came to fruition? What would it consist of, and what standards would be set that if violated, would result in corresponding punishment? The idea to self-regulate is tough, but as described in this research, the United States military has been doing this for over two centuries; not just because it is

written, but because there is a duty to hold high standards for the American people for whom they serve.

There were several examples of misconduct discovered in both institutions. However, delving into these types of specifics would detract from the true point of this research. Through this research, it is imperative for the Senate to make several changes and articulate these changes to the American people. Confidence will not be restored unless the Senate makes this a priority and experiences a true paradigm shift in how they police themselves. Without trust, there is no confidence and subordinates and constituents expect our national leaders to be held to the same standards and held accountable to the same, if not a higher, set of rules.

¹Josh Chafetz, “Cleaning House: Congressional Commissioners for Standards,” *Yale Law Journal* 117, no. 7 (October 2007): 165-173, <http://www.yalelawjournal.org/comment/cleaning-house-congressional-commissioners-for-standards> (accessed April 19, 2014).

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